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CORROBORATION OF ACCOMPLICE TESTIMONY IN FEDERAL CRIMINAL CASES

LESTER B. ORFIELD†

I.

INTRODUCTION

IN GENERAL UNDER the Anglo-American approach to evidence witnesses are to be weighed, not counted.¹ It follows that testimony by a single witness may be sufficient to convict. But there are exceptions to this approach. In cases of treason the Constitution requires the testimony of two witnesses as to the overt acts of the defendant. One may not be convicted of perjury on the uncorroborated testimony of a single witness.² An extrajudicial confession must be corroborated.³ In many states statutes require corroboration of accomplice testimony and of the prosecutrix's testimony in sexual offenses. This article will deal with the last two problems.⁴

II.

WHAT LAW GOVERNS

Prior to 1933 the federal courts in matters of evidence applied the law of the state in which the federal court was sitting.⁵ As to the thirteen original states they applied the state law in force in 1789. As to other states they applied the law of the state at the date of its admission to the Union. But as will be seen the development was some-

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1. See note, 34 HARV. L. REV. 667 (1921).

2. Orfield, *Proof of Perjury and the "Two Witnesses" Requirement in Federal Criminal Cases*, 17 SW. L.J. 227 (1963).

3. Orfield, *Confessions of Federal Criminal Defendants*, 16 U. FLA. L. REV. 219 (1963).

4. On corroboration of the testimony of an accomplice see 3 JONES, *EVIDENCE* 1522-27 (5th ed. 1958); 1 MATTHEWS, *HOW TO TRY A FEDERAL CRIMINAL CASE*, 623-24 (1960); 2 WHARTON, *CRIMINAL EVIDENCE* 221-64 (12th ed. 1955); 7 WIGMORE, *EVIDENCE* §§ 2056-60 (3d ed. 1940); 1 UNDERHILL, *CRIMINAL EVIDENCE* 329-412 (5th ed. 1956); Note, *Accomplice Corroboration—Its Status in California*, 9 U.C.L.A. L. REV. 190 (1962).

5. Orfield, *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121, 133-43 (1963).

what different as to corroboration of accomplice testimony. The cases prior to 1888 made no reference to state law. They simply applied the common law rule that no corroboration was required. In fact, the common law rule was the early rule in the states since the state statutes requiring corroboration are of modern origin.⁶

In 1888 a court referred to state statutory law as requiring corroboration in a federal case tried in that state.⁷ In 1903 the Court of Appeals for the Second Circuit held that the New York statute requiring corroboration did not apply to a federal case tried in New York.⁸ Since there was no federal statute, the common law applied. In 1912 a federal court required corroboration of an accomplice because this was the rule of the state at the time of the Revolution.⁹ In 1915 the Ninth Circuit reached a contrary result in holding that a state statute requiring corroboration did not apply in federal cases.¹⁰ No federal statute required corroboration; in the absence of specific provision by Congress, the common law applies. In *Caminetti v. United States* the Supreme Court laid down the rule requiring no corroboration and made no reference to state law.¹¹ In no case had any federal court expressly stated that the court must look to the state law as of 1789 or at the date of its admission to the Union. In 1933 the Supreme Court made it clear that the federal courts now proceed "in the light of reason and experience."¹² This meant that neither early state law nor present state law governed federal cases.

The Federal Rules of Criminal Procedure, which went into effect in 1946, do not deal specifically with corroboration of accomplice testimony.¹³ Rule 57 (b) of the Federal Rules provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute." Rule 26 authorizes the courts to lay down rules of evidence in the light of reason and experience. When the Rules were drafted a proposal to require corroboration of accomplices was rejected.¹⁴ Neither the Model

6. See 7 WIGMORE, EVIDENCE § 2056, n.10 (3d ed. 1940).

7. *United States v. Hinz*, 35 Fed. 272, 278 (C.C.N.D. Cal. 1888). The court also cited GREENLEAF, EVIDENCE § 380. The reference was rather casual. The court did not expressly refer to California law at the date of its admission to the Union.

8. *Hanley v. United States*, 123 Fed. 849, 850 (2d Cir. 1903).

9. *Keliher v. United States*, 193 Fed. 8, 15 (1st Cir. 1912). The state was Massachusetts. The court did not refer to the law of Massachusetts as of 1789.

10. *Lung v. United States*, 218 Fed. 817, 818 (9th Cir. 1915); see also *Bandy v. United States*, 245 Fed. 98, 101 (8th Cir. 1917).

11. 242 U.S. 470, 495, 37 S.Ct. 192, 198 (1917). See also *Waldeck v. United States*, 2 F.2d 243, 245 (7th Cir. 1924), cert. denied, 267 U.S. 595, 95 S.Ct. 232 (1925); *West v. United States*, 113 F.2d 68, 69 (5th Cir. 1944).

12. See also *Wolfe v. United States*, 291 U.S. 7, 12, 54 S.Ct. 279 (1934); *Funk v. United States*, 290 U.S. 371, 54 S.Ct. 212 (1933).

13. *Stephenson v. United States*, 211 F.2d 702, 705 (9th Cir. 1954).

14. Orfield, *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121, 130-31 (1963).

Code of Evidence nor the Uniform Rules of Evidence deals with the subject of accomplice corroboration.

Under the Federal Rules of Criminal Procedure state law does not apply to the federal law as to corroboration. That is to say, corroboration is not required in the federal courts even though the state where the case is tried would bar a conviction on uncorroborated testimony.¹⁵

In pre-Federal Rules prosecutions, if a case were commenced in a state court and later removed to the federal court, the court would look at the state definition of accomplices.¹⁶ But under Rule 54 (b) (1) on removed proceedings it would seem that federal law would now govern in such a case. The rule provides: "These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law."

III.

COMPETENCY OF ACCOMPLICE

It has been decided that an accomplice is competent to testify.¹⁷ As one court has put it: "A co-conspirator, although an accomplice, whose testimony is uncorroborated is a competent witness against his co-conspirator, not only as to the existence of the conspiracy, but also as to the participation of his co-conspirator therein."¹⁸

IV.

HISTORY OF THE RULE REQUIRING NO CORROBORATION

In 1829, District Judge Hopkinson explained that once a witness is admitted to be competent, his credibility rests entirely with the jury, who may therefore convict upon the testimony of an accomplice, though unsupported by any other proof.¹⁹ However, he indicates that this is seldom the case.

[I]t is usual for the court to advise a jury not to regard the evidence of any accomplice unless he is confirmed in some parts of his testimony by unimpeachable testimony. But you are not to

15. *Doherty v. United States*, 230 F.2d 605 (9th Cir. 1956).

16. *Cheatham v. Texas*, 48 F.2d 749-51 (5th Cir. 1931).

17. *United States v. Lancaster*, 44 Fed. 896, 921 (W.D. Ga. 1891); *United States v. Troax*, 28 Fed. Cas. 216 (No. 16540) (C.C.D. Ohio 1843); *Steinham v. United States*, 22 Fed. Cas. 1235, 1236 (No. 13355) (C.C.D. Vt. circa 1829).

18. *Colt v. United States*, 160 F.2d 650, 651 (5th Cir. 1947). See 2 WIGMORE, EVIDENCE §§ 526, 580 (3d ed. 1940); Orfield, *Competency of Witnesses in Federal Criminal Cases*, 46 MARQ. L. REV. 324, 335-38 (1963).

19. *United States v. Kessler*, 26 Fed. Cas. 766 (No. 15588) (C.C.D. Pa. 1829).

understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves of itself those parts it applies to. If he is confirmed in material parts, he may be credited in others; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence; from the nature, probability and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.²⁰

In another early case Circuit Justice Thompson stated:

It may be proper in many cases, for the court to caution a jury against convicting upon the uncorroborated evidence of an accomplice; but if he is both competent and credible, it would involve an absurdity to say his testimony was not sufficient to establish a fact. The rule, however, I consider well settled as authority, and the fitness and propriety of it on principle need not be urged.²¹

The case involved a civil action for a penalty, rather than the normal criminal proceeding. A similar view was taken by Circuit Judge Dillon in a prosecution for criminal conspiracy in 1876,²² and about 1883 by another court.²³

In 1841, one court stated that the evidence of an accomplice "should be received with great caution, and where uncorroborated, should have little weight. The law made him a competent witness, though by his own statement he was an accomplice."²⁴ But more weight is given if several accomplices testify, and their evidence is consistent, and where the jury can see that they had an opportunity to observe the facts to which they testify.²⁵ It is the duty of the United States Attorney to determine whether the public interest requires that the testimony of an accomplice shall be offered.²⁶

In a conspiracy prosecution in 1891, it was held that a conviction for conspiracy cannot be had on the uncorroborated testimony of a

20. *Ibid.* The case was followed in *United States v. Ybanez*, 53 Fed. 536, 540 (W.D. Tex. 1892); *United States v. Reeves*, 38 Fed. 404, 410 (W.D. Tex. 1889).

21. *Steinham v. United States*, 22 Fed. Cas. 1235-36 (No. 13355) (C.C.D. Vt. circa 1829).

22. *United States v. Babcock*, 24 Fed. Cas. 913, 925 (No. 14487) (C.C.E.D. Mo. 1876).

23. *United States v. Flemming*, 18 Fed. 907, 917 (N.D. Ill. 1883). See also *United States v. Thompson*, 31 Fed. 331, 333 (C.C.D. Ore. 1887); *United States v. Neverson*, 12 D.C. (1 Mackey) 152, 157 (1880).

24. *United States v. Lancaster*, 26 Fed. Cas. 854, 859 (No. 15556) (C.C.D. Ill. 1841). See also *United States v. Sacia*, 2 Fed. 754, 758, 762-63 (D. N.J. 1880); *United States v. Smith*, 27 Fed. Cas. 1144, 1147 (No. 16322) (C.C.S.D. Ohio 1869).

25. *United States v. Blaisdell*, 24 Fed. Cas. 1162, 1170 (No. 14608) (S.D.N.Y. 1869).

26. *United States v. Hartwell*, 26 Fed. Cas. 204, 206 (No. 15319) (C.C.D. Mass. 1870).

coconspirator, nor can coconspirators corroborate each other.²⁷ A subsequent case concluded that this opinion was "not sustained by the federal decisions."²⁸

Four years later the Supreme Court stated:

On behalf of the defendant it is its [the court's] duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the inducements to falsehood on the part of an accomplice are so great.²⁹

In 1909, the Supreme Court classified the testimony of a confessed accomplice as somewhat less reliable than "that of any ordinary witness, of good character, in a case where testimony is generally and *prima facie* supposed to be correct."³⁰ "On the contrary," the Court advised "the evidence of such a witness ought to be received with suspicion, and with the greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness until he has been pardoned."³¹

Just a year later the Supreme Court stated: "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."³² But there is no reversible error where the defendant fails to ask for such a caution.

Oddly enough, in 1915 the Court of Appeals for the Second Circuit held that corroboration was not needed and that the common law did not require corroboration.³³ The holding was unnecessary as there was corroborating evidence. Finally in *Caminetti v. United States*³⁴

27. *United States v. Logan*, 45 Fed. 872, 890 (N.D. Tex. 1891), *rev'd on other grounds*, *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617 (1892). See also *United States v. Hinz*, 35 Fed. 272, 278 (C.C.N.D. Cal. 1888).

28. *Wong Din v. United States*, 135 Fed. 702, 706 (9th Cir. 1905). See also *United States v. Lancaster*, 44 Fed. 896, 921 (W.D. Ga. 1891); *United States v. Sacia*, 2 Fed. 754, 758, 762-63 (D. N.J. 1880).

29. *Reagan v. United States*, 157 U.S. 301, 310, 15 S.Ct. 610, 613 (1895). See also *Ahearn v. United States*, 158 Fed. 606 (2d Cir. 1907); *Hanley v. United States*, 123 Fed. 849, 851 (2d Cir. 1903); *United States v. Giuliani*, 147 Fed. 594, 598 (D. Del. 1906).

30. *Crawford v. United States*, 212 U.S. 183, 29 S.Ct. 260 (1909).

31. *Crawford v. United States*, 212 U.S. 183, 29 S.Ct. 260 (1909). The case was followed in *Lung v. United States*, 218 Fed. 817, 818 (9th Cir. 1915).

32. *Holmgren v. United States*, 217 U.S. 509, 523, 30 S.Ct. 588, 592 (1910). See also *Sykes v. United States*, 204 Fed. 909, 913 (8th Cir. 1913); *Fain v. United States*, 209 Fed. 525, 533 (8th Cir. 1913); *Richardson v. United States*, 181 Fed. 1, 9 (3d Cir. 1910).

33. *Mark Yick Hee v. United States*, 223 Fed. 732, 735 (2d Cir. 1915). See also *Erber v. United States*, 234 Fed. 221, 225 (2d Cir. 1916), *rev'd on other grounds*.

34. 242 U.S. 470, 37 S.Ct. 192 (1917).

the Supreme Court held that while it is the better practice to caution juries against too much reliance on the testimony of accomplices and against believing such testimony without corroboration, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."³⁵ In the absence of a request for instructions as to accomplice testimony, the trial judge need not instruct.³⁶ One court has gone so far as to say, "it is the better practice so to instruct in any event," that is to say, even without request.³⁷ After the decision in the *Caminetti* case, most courts acquiesced. "However bitterly such testimony may be assailed before the jury, the fact remains that it alone may support a verdict."³⁸ As Learned Hand has instructed:

The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence. If he thinks it unnecessary—at least when, as here, the guilt is plain—he may properly refuse to give it.³⁹

Four years later he stated that while it is common practice to caution the jury as to accomplice testimony "it is not necessary even when as here the accused asks that it be done."⁴⁰ The same view was espoused by Judge John J. Parker in stating: "the rule is well settled that whether the trial judge shall caution the jury with respect to the weight to be given the testimony of an accomplice is a matter resting in his sound discretion."⁴¹

A decade later the Seventh Circuit fell into line: "He stresses the fact that the Government's case is based largely on the testimony of accomplices who had previously pleaded guilty. But it is well established that a conviction may rest alone on the testimony of a codefendant or

35. *Id.* at 495, 37 S.Ct. at 198. The Court did not intimate that the law of 1789 or the law as of the date of admission to the Union applied. See Orfield, *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121, 141 (1963).

36. *Rachmil v. United States*, 288 Fed. 782, 785 (2d Cir. 1923).

37. *Lett v. United States*, 15 F.2d 686, 689 (8th Cir. 1926).

38. *Allen v. United States*, 4 F.2d 688, 690 (7th Cir. 1925), *cert. denied*, 267 U.S. 598 (1925). See also *Delvally v. United States*, 88 F.2d 579, 581 (7th Cir. 1937); *Tuckerman v. United States*, 291 Fed. 958, 963 (6th Cir. 1923); *Wolf v. United States*, 283 Fed. 885, 888 (7th Cir. 1922); *Heitler v. United States*, 244 Fed. 140, 144 (7th Cir. 1917), citing *WIGMORE, EVIDENCE* § 2056; *Wallace v. United States*, 243 Fed. 300, 307 (7th Cir. 1917).

39. *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933). He stated that the only contrary case was *Freed v. United States*, 266 Fed. 1012, 1014 (D.C. Cir. 1920).

40. *United States v. Block*, 88 F.2d 618, 621 (2d Cir. 1937). See also *United States v. Wilson*, 154 F.2d 802, 805 (2d Cir. 1946); *United States v. Moran*, 151 F.2d 661, 662 (2d Cir. 1945).

41. *Hanks v. United States*, 97 F.2d 309, 312 (4th Cir. 1938).

an accomplice."⁴² By 1949 the Ninth Circuit was able to conclude that all federal courts except possibly the First Circuit⁴³ applied the rule that no corroboration is required.⁴⁴ This view was given greater vitality in the 1950's when the Eighth Circuit admitted that the uncorroborated testimony of an accomplice "can legally constitute a sufficient basis for a conviction, if it is not otherwise incredible or unsubstantial on its face."⁴⁵ Similarly the Third Circuit held: "It is no longer open to doubt that a jury may convict on the testimony of an accomplice alone."⁴⁶ A similar view was expounded in 1956 when the Eighth Circuit pointed out that while it is the better practice to give the cautionary instruction where in fact corroboration is lacking, there is no reversible error in not giving the instruction where the facts showed substantial corroboration.⁴⁷ An appellate court is not required to consider the contention of the Government that in fact there was corroboration.⁴⁸

In 1959, evidently in reply to proposed alterations of the rules regarding accomplice testimony, Judge Yankwich declared, "Any change of the rule should be made by Congressional legislation applicable to all federal courts, and not by judicial fiat, which, unless it is that of the Supreme Court, would affect certain federal courts only."⁴⁹ Furthermore he defended the existing rule pointing out that "there are ample reasons, historical, psychological and other, for not changing a cautionary rule into a rigid and dogmatic method of proof for ordinary criminal offenses."⁵⁰ Lastly, in 1960, the Ninth Circuit made it emphatically clear that it would not retreat from the rule that the testimony of an accomplice need not be corroborated.⁵¹ The Sixth Circuit agreed.⁵²

42. *United States v. Karavias*, 170 F.2d 968, 971 (7th Cir. 1948). See also *United States v. Bucur*, 194 F.2d 297, 305 (7th Cir. 1952); *United States v. Cook*, 184 F.2d 642, 644 (7th Cir. 1950); *Todorow v. United States*, 173 F.2d 439, 444 (9th Cir. 1949), *cert. denied*, 337 U.S. 925, 69 S.Ct. 1169 (1949); *Gormley v. United States*, 167 F.2d 454, 457 (4th Cir. 1948).

43. *Keliher v. United States*, 193 Fed. 8, 15 (1st Cir. 1912).

44. *Catrino v. United States*, 176 F.2d 884, 889 (9th Cir. 1949).

45. *Haakinson v. United States*, 238 F.2d 775, 779 (8th Cir. 1956).

46. *United States v. Migliorino*, 238 F.2d 7, 10 (3d Cir. 1956).

47. *Stoneking v. United States*, 352 F.2d 835 (8th Cir. 1956), *cert. denied*, 352 U.S. 835, 77 S.Ct. 54 (1956). See also *Burger v. United States*, 262 F.2d 946, 954 (8th Cir. 1959); *Christy v. United States*, 261 F.2d 357, 361 (9th Cir. 1958); *Azure v. United States*, 248 F.2d 335, 337-38 (8th Cir. 1957).

48. *Waldeck v. United States*, 2 F.2d 243, 245 (7th Cir. 1924), *cert. denied*, 267 U.S. 595, 45 S.Ct. 232 (1924). See also *Lyles v. United States*, 249 F.2d 744, 745 (5th Cir. 1957); *Stanley v. United States*, 245 F.2d 427, 432 (6th Cir. 1957).

49. *Audett v. United States*, 265 F.2d 837, 848 (9th Cir. 1959).

50. *Id.* at 847.

51. *Marcella v. United States*, 285 F.2d 322, 323 (9th Cir. 1960). See also *United States v. Ross*, 203 F. Supp. 100, 102 (E.D. Pa. 1962).

52. *United States v. Finazzo*, 288 F.2d 175, 176 (6th Cir. 1961). See also *Continental Baking Company v. United States*, 281 F.2d 137, 155 (6th Cir. 1960).

There were some judges who were not content to follow the tide. After *Caminetti* was decided, one trial judge ruled that where the only evidence on which a conviction could be sustained was the testimony of an accomplice, and he left the stand a thoroughly discredited witness, a directed verdict in favor of the defendant should be rendered.⁵³ Some cases even insisted on instructions as to caution in using accomplice testimony.⁵⁴ Different courts found different ways to curb the weight of accomplice testimony. One court said that a trial judge may properly charge that there was greater probability of the truth of the testimony of two accomplices rather than one.⁵⁵ Another court directed a verdict where there was only the uncorroborated testimony of a conspirator who admitted he had given contradictory testimony before the grand jury.⁵⁶ Still another court decided that where the only evidence against the defendant was that of a confessed accomplice, and the court erroneously instructed that such testimony was supported by admissions or confessions made by the defendant when the defendant had not made such, there was reversible error.⁵⁷

One Eighth Circuit decision found the better rule to be contrary to that seen in the beginning of this article, and declared flatly that it was incumbent upon the court to instruct that the testimony of an accomplice should be received with great caution, and a refusal to do so, when requested, is reversible error.⁵⁸ The error is enhanced when the trial judge states, in substance, his belief in such testimony. Where the evidence for the government is largely that of accomplices it is important to instruct the jury as to the proper consideration to be given to evidence of good character of the defendant.⁵⁹ In 1938, a court of appeals held that where the record showed that the defendant, whose conviction rested largely on the testimony of one of three accomplices testifying for the Government, and the trial judge in summing up accentuated the effect of the accomplice's testimony, omitted certain contrary evidence, failed to tell the jury that the accomplice's testimony

53. *United States v. Murphy*, 253 Fed. 404, 407 (N.D.N.Y. 1918). See also *Esters v. United States*, 260 F.2d 393, 394 (8th Cir. 1958); *McGinniss v. United States*, 256 Fed. 621, 625 (2d Cir. 1919); *United States v. Haderlein*, 118 F. Supp. 346, 348 (N.D. Ill. 1953). See for an earlier, similar case, *Sykes v. United States*, 204 Fed. 909, 913 (8th Cir. 1913).

54. *Freed v. United States*, 266 Fed. 1012, 1014 (D.C. 1920), criticized 34 HARV. L. REV. 443 (1921); *Freedman v. United States*, 268 Fed. 655, 657 (3d Cir. 1920); *Egan v. United States*, 287 Fed. 958, 966 (D.C. 1923).

55. *Woods v. United States*, 279 Fed. 706, 712 (4th Cir. 1922).

56. *United States v. Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953).

57. *Surratt v. United States*, 269 F.2d 240 (D.C. Cir. 1959).

58. *Lett v. United States*, 15 F.2d 686, 689 (8th Cir. 1926).

59. *Nanfito v. United States*, 20 F.2d 376, 379 (8th Cir. 1927).

should be received with caution and could not be corroborated by another accomplice, the defendant was entitled to a new trial.⁶⁰ As one modern day court has put it: "A skeptical approach to accomplice testimony is a mark of the fair administration of justice."⁶¹

Where the accomplice has confessed but has not yet been convicted the judge, as a matter of practice, should warn the jury to view such testimony with caution. The evidence of such a witness "ought to be received with suspicion, and with the greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."⁶²

Although he has pleaded guilty, an accomplice may testify.⁶³ But where the evidence in a prosecution for housebreaking and grand larceny disclosed a close relationship between a defendant and a codefendant in the events leading to their arrests, receiving the codefendant's plea of guilty in the presence of the jury, and calling attention to such plea while evidence was taken, and while instructing the jury, was prejudicial to the defendant's right to be tried only on the evidence against him.⁶⁴ However, where the accomplice is named as a codefendant in the indictment and has pleaded guilty, and the jury is so advised, it is not necessary to caution as to accomplice testimony.⁶⁵

When a court has instructed the jury that the testimony of an accomplice should be received with caution, it is not necessary to instruct that his testimony should be considered in the light of a hope for leniency. This would be "tantamount to requiring the court to argue the facts of the case for the defendants."⁶⁶ It makes no difference that it is shown that the accomplice would personally benefit from testifying against the defendant.⁶⁷ That fact alone does not disqualify the accomplice as a witness, but goes only to the weight of his testimony.⁶⁸

60. *Arnold v. United States*, 94 F.2d 499, 506 (10th Cir. 1938).

61. *Phelps v. United States*, 252 F.2d 49, 52 (5th Cir. 1958); *Ward v. United States*, 296 F.2d 898, 901 (5th Cir. 1961).

62. *Crawford v. United States*, 212 U.S. 183, 204, 29 S.Ct. 260, 268 (1909). See also *Wellman v. United States*, 297 Fed. 925, 933 (6th Cir. 1934).

63. *Ryan v. United States*, 216 Fed. 13, 38 (7th Cir. 1914), *cert. denied*, 232 U.S. 726, 34 S.Ct. 603 (1914). In this case an accomplice so pleaded before trial and the other during the trial, but before any evidence was introduced. See also *United States v. Karavias*, 170 F.2d 968, 971 (7th Cir. 1948); *McCormick v. United States*, 9 F.2d 237, 239 (8th Cir. 1925); *Fitter v. United States*, 258 Fed. 567, 576 (2d Cir. 1919).

64. *Payton v. United States*, 222 F.2d 794, 795 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 944, 77 S.Ct. 267 (1956).

65. *Stoneking v. United States*, 232 F.2d 385, 392 (8th Cir. 1956), *cert. denied*, 352 U.S. 835, 77 S.Ct. 54 (1956).

66. *United States v. Scoblick*, 225 F.2d 779, 783 (3d Cir. 1955).

67. *Nichols v. United States*, 276 F.2d 147, 148 (6th Cir. 1960).

68. *United States v. Carengella*, 198 F.2d 3, 7 (7th Cir. 1952), *cert. denied*, 344 U.S. 881, 73 S.Ct. 179 (1952); *United States v. Rainone*, 192 F.2d 860 (2d Cir.

The trial judge need not instruct that the personal interest of the witness should be considered by the jury.⁶⁹

The defense may show by cross-examination that the testimony of a government witness was given in return for a promise of a lighter sentence or other preferential treatment.⁷⁰ There is reversible error if the right is denied. However, in the absence of the defendant's request for an instruction as to accomplice testimony, failure to warn is not prejudicial error.⁷¹ At least one court has also held that it is not prejudicial error even if such an instruction is requested.⁷² If on appeal the record is silent as to a cautionary instruction, one court has reasoned that "we must assume that the trial court directed the jury that the testimony of the accomplice must be minutely examined and weighed with great caution."⁷³

The rule that no corroboration is required applies to criminal contempt.⁷⁴

Since corroboration is not required at the trial it would seem clear that it is not required at the preliminary examination, and it has been so held.⁷⁵ Thus, the constitutional requirement that there be two witnesses to the overt act of treason does not apply to the preliminary examination.⁷⁶ Likewise on a preliminary examination a confession of the defendant, without any proof of the corpus delicti, is sufficient to hold the defendant for trial.⁷⁷

1951); *Pina v. United States*, 165 F.2d 890, 892 (9th Cir. 1948); *Weaver v. United States*, 111 F.2d 603, 608 (8th Cir. 1940); *Reuben v. United States*, 86 F.2d 464, 466 (7th Cir. 1936), *cert. denied*, 300 U.S. 671, 57 S.Ct. 513 (1936); *cf. Wellman v. United States*, 297 Fed. 925, 934 (6th Cir. 1924).

69. *United States v. Wilson*, 154 F.2d 802, 805 (2d Cir. 1946) (opinion by Clark, J.), *cert. granted*, 328 U.S. 823, 66 S.Ct. 1363 (1946), *judgment vacated, case remanded for resentencing*.

70. *United States v. Migliorino*, 238 F.2d 7, 10-11 (3d Cir. 1956); *United States v. Hogan*, 232 F.2d 905 (3d Cir. 1956). See Orfield, *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 KAN. L. REV. 447, 459-60 (1963).

71. *Holmgren v. United States*, 217 U.S. 509, 523 (1910).

72. *Papadakis v. United States*, 208 F.2d 945, 954 (9th Cir. 1953); *United States v. Block*, 88 F.2d 618, 621 (2d Cir. 1937). See also note 51 *supra*.

73. *United States v. Glasser*, 116 F.2d 690, 703 (7th Cir. 1940), *rev'd on other grounds*, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457 (1942).

74. *Rapp v. United States*, 146 F.2d 548, 550 (9th Cir. 1944).

75. See *Curreri v. Vice*, 77 F.2d 130 (9th Cir. 1935), *cert. denied*, 296 U.S. 638, 56 S.Ct. 170 (1935). Note, 45 YALE L.J. 1324 (1936). This was a case of international extradition. See also *Ex parte Jackson*, 6 Alaska 726, 729-30 (1932). See Orfield, *Proceedings Before the Commissioner in Federal Criminal Procedure*, 19 U. PRR. L. REV. 489, 531-34 (1958).

76. *Charge to the Grand Jury*, 30 Fed. Cas. 1047, 1049 (No. 18276) (C.C.D. Mass. 1861); *United States v. Greiner*, 26 Fed. Cas. 36, 40 (No. 15262) (E.D. Pa. 1861); *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.D. Va. 1807). *But see Case of Fries*, 9 Fed. Cas. 826, 914 (No. 5126) (C.C.D. Pa. 1799).

77. *United States v. Bloomgart*, 24 Fed. Cas. 1180, 1181 (No. 14612) (S.D.N.Y. 1868); *United States v. Kallas*, 272 Fed. 742, 749 (W.D. Wash. 1921).

V.

WHO IS AN ACCOMPLICE

An accomplice is a *particeps criminis*,⁷⁸ he is one who "is associated with another, or others, in the commission of a crime. Liability to indictment, under ordinary conditions, is a reasonable test of the legal relation of the party to the crime and its perpetrators."⁷⁹ Or, in the view of another court, "Anyone who knowingly and voluntarily co-operates with, aids, assists, advises, or encourages another in the commission of an offense is an 'accomplice,' regardless of the degree of his guilt."⁸⁰ There must be "liability to indictment for the same offense."⁸¹ Persons who are accomplices to wholly distinct offenses do not come within the rule as to cautionary instructions although, of course, the unlawful activities may affect their credibility.⁸² Corroboration may be by a witness charged with a similar offense if he is not concerned in the particular offense charged against the defendant.⁸³ However, he is not considered an accomplice.

Generally most American state courts require that a witness, to be an accomplice, must be liable for the identical statutory offense charged against the defendant.⁸⁴ Thus, a coconspirator may be an accomplice,⁸⁵ but one who is forced to take part in an offense is not.⁸⁶ In the federal courts the giver of a bribe is considered an accomplice of

78. *United States v. Ybanez*, 53 Fed. 536, 540 (W.D. Tex. 1892). See also *United States v. Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949); *Singer v. United States*, 278 Fed. 415, 419 (3d Cir. 1932); *United States v. Neverson*, 12 D.C. (1 Mackey) 152, 156 (1880).

79. *Yeager v. United States*, 16 App. D.C. 356, 359 (1900). See also *Holmgren v. United States*, 156 Fed. 439, 444 (9th Cir. 1907); *Jackson v. United States*, 48 App. D.C. 269, 271 (1919); *Thompson v. United States*, 30 App. D.C. 352, 363 (1908).

80. *Egan v. United States*, 287 Fed. 964 (D.C. Cir. 1923); see also *Risinger v. United States*, 236 F.2d 96, 99 (5th Cir. 1956); *Lett v. United States*, 15 F.2d 686, 689 (8th Cir. 1926). An accessory before the fact is an accomplice. *McLendon v. United States*, 19 F.2d 465, 466 (8th Cir. 1927).

81. *Phelps v. United States*, 252 F.2d 49, 52 (5th Cir. 1958); *Yeager v. United States*, 16 App. D.C. 356, 361 (1900); *Risinger v. United States*, 236 F.2d 96, 99 (5th Cir. 1956); *Stephenson v. United States*, 211 F.2d 702, 704 (9th Cir. 1954); *Jackson v. United States*, 48 App. D.C. 269, 271 (1919). See Note, 1951 ILL. L.F. 312, 314; Note, 17 Ky. L.J. 297 (1929).

82. *Doty v. United States*, 261 F.2d 10, 13 (10th Cir. 1958). The court cited 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940).

83. *United States v. Van Leuven*, 65 Fed. 78, 83 (N.D. Iowa 1894).

84. Note, 9 U.C.L.A.L. Rev. 190, 191-92 (1962); Annot., 53 A.L.R.2d 817, 828 (1957).

85. *United States v. Sacia*, 2 Fed. 754, 758, 762-63 (D. N.J. 1880); *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397, 402 (4th Cir. 1958), *aff'd*, 360 U.S. 795, 79 S.Ct. 1237 (1959); *Colt v. United States*, 160 F.2d 650, 651 (5th Cir. 1947), *cert. denied*, 318 U.S. 779, 63 S.Ct. 854 (1943); *Stewart v. United States*, 131 F.2d 624 (5th Cir. 1942).

86. *United States v. Ybanez*, 53 Fed. 536, 540 (C.C.W.D. Tex. 1892). The offense was a violation of the neutrality laws by sending forth a military expedition against Mexico.

the receiver,⁸⁷ but in the state courts there are many contrary decisions.⁸⁸ Wigmore concludes that the other party to a bribe is not an accomplice.⁸⁹ On a prosecution for subornation of perjury, the subornee is not an accomplice.⁹⁰ While most state courts hold that a thief is not the accomplice of one who knowingly receives stolen goods, he may be an accomplice where there was a conspiracy between the two to commit the crime of larceny and receipt of stolen goods.⁹¹ A buyer of intoxicating liquor is not an accomplice.⁹² The purchaser of morphine is an accomplice,⁹³ but not if he is acting for the government.⁹⁴ One court has stated that "where two persons wager on the result of an event—as in this instance a horse race—one is not the accomplice of the other. To establish the relation of accomplice, two or more persons must unite in a common purpose to do an unlawful act. When two or more persons wager on the result of a certain event, the purpose of each is diametrically opposed to that of the other."⁹⁵ The same theory applies to parties to a duel.

Sexual offenses require separate treatment. The other person involved, usually a woman, may or may not be an accomplice, depending on whether such person was a victim or a voluntary partner in the offense. Even if such a person were not a voluntary partner, his or her testimony may sometimes involve psychological aberrations. Possibly such a witness should submit to a lie detector test or to a psychiatric examination. A territorial case seemed to imply that a woman, the other party to adultery, is an accomplice.⁹⁶

A wife who is transported in interstate commerce for purposes of prostitution is not an accomplice,⁹⁷ nor, in the view of many cases, is

87. *Egan v. United States*, 287 Fed. 958, 964 (D.C. Cir. 1923). See also *Ritzman v. United States*, 3 F.2d 718, 720 (D.C. Cir. 1925).

88. See 7 WIGMORE, EVIDENCE § 2060 (3d ed. 1940); Annot., 73 A.L.R. 389 (1931); 21 J. CRIM. L., C. & P.S. 446 (1931); 17 ORE. L. REV. 118 (1938); 24 VA. L. REV. 329 (1938); 25 VA. L. REV. 203, 204 (1938).

89. 7 WIGMORE, EVIDENCE § 2060 (3d ed. 1940).

90. *United States v. Thompson*, 31 Fed. 331, 333 (C.C.D. Ore. 1887); *Petite v. United States*, 262 F.2d 788, 794 (4th Cir. 1959). See Annot., 56 A.L.R. 407, 412 (1928); Orfield, *Proof of Perjury and the "Two Witnesses" Rule in Federal Criminal Cases*, 17 Sw. L.J. 227, 238-39 (1963).

91. *Stephenson v. United States*, 211 F.2d 702, 704 (9th Cir. 1954); *Ing v. United States*, 278 F.2d 362, 365 (9th Cir. 1960). See Annot., 9 A.L.R. 1397 (1920); Annot., 32 A.L.R. 449 (1924); Annot., 111 A.L.R. 1392 (1937); Note, 25 VA. L. REV. 203, 205-06 (1938).

92. *Lott v. United States*, 205 Fed. 28, 29 (9th Cir. 1913); *DeLong v. United States*, 4 F.2d 244 (8th Cir. 1925); *Singer v. United States*, 278 Fed. 415, 419 (3d Cir. 1922), cert. denied, 258 U.S. 620, 42 S.Ct. 272 (1922); see 24 HARV. L. REV. 61 (1910).

93. *Lett v. United States*, 15 F.2d 686, 689 (8th Cir. 1926).

94. *Lett v. United States*, 15 F.2d 686, 690-91 (8th Cir. 1926); *Smith v. United States*, 17 F.2d 723, 724 (8th Cir. 1927); *United States v. Hughey*, 116 F. Supp. 649, 653 (W.D. Ark. 1953), aff'd, 212 F.2d 896 (8th Cir. 1954).

95. *Paylor v. United States*, 42 App. D.C. 428, 429 (D.C. Cir. 1914). See Annot., 1913 L.R.A. (n.s.) 546.

96. *United States v. Kershaw*, 5 Utah 618, 19 Pac. 194, 195 (1888).

97. *Levine v. United States*, 163 F.2d 992 (5th Cir. 1947).

the victim of a Mann Act violation.⁹⁸ In one case it was suggested that nevertheless a cautionary instruction should be given.⁹⁹ In a White Slave case, where the trial judge erroneously charged that a girl transported was an accomplice, the defendant could not complain, as the charge benefited the defendant by tending to weaken the force of the girl's testimony.¹⁰⁰ On a prosecution for maintaining a bawdy house the inmates are not accomplices.¹⁰¹

In a case where the defendant was being charged with common law rape, it was held that corroboration must be present in the sense that there must be circumstances in evidence which tend to support the story of the prosecutrix.¹⁰² In that particular case there was corroboration through evidence that the defendant was present in the apartment visiting with the prosecutrix a short time previously, he spent the night in a room nearby, force was used against the door of the prosecutrix's bedroom, and that she had complained promptly to friends and the police. Direct corroboration in the sense of testimony by an eyewitness is not required.

On a prosecution for statutory rape it was held that technically corroboration is not necessary;¹⁰³ yet a verdict was set aside for lack of it. The court did not treat the prosecutrix as an accomplice. In Puerto Rico, on the same charge, corroboration of the prosecutrix was required because a Puerto Rican statute required it.¹⁰⁴

In the District of Columbia it was held that on a charge of seduction, corroboration was not required. But on the facts there was corroboration of the testimony of the prosecutrix that a promise of marriage induced her downfall when the defendant admitted that he had promised marriage.¹⁰⁵

98. *Lee v. United States*, 32 F.2d 424 (D.C. Cir. 1929); *Gebardi v. United States*, 287 U.S. 112, 119, 53 S.Ct. 35, 36 (1932); Notes, 46 HARV. L. REV. 520 (1933); 23 J. CRIM. L. 846 (1933); 31 MICH. L. REV. 993, 994 (1933); 10 N.Y.U. L. REV. 392 (1933); 81 U. PA. L. REV. 474, 475 (1933); 19 VA. L. REV. 293 (1933). See also *Wegman v. United States*, 272 F.2d 31, 33 (8th Cir. 1959); *United States v. Sorrentino*, 78 F. Supp. 425, 431 n.3 (M.D. Pa. 1948); *United States v. Jamerson*, 60 F. Supp. 281, 285 (N.D. Iowa 1944). But see *Caminetti v. United States*, 242 U.S. 470, 495, 37 S.Ct. 192, 198 (1917).

99. *Freed v. United States*, 266 Fed. 1012, 1016 (D.C. Cir. 1920); Note, 34 HARV. L. REV. 443 (1921).

100. *Lee v. United States*, 32 F.2d 424 (D.C. Cir. 1929).

101. *Jackson v. United States*, 48 App. D.C. 269, 271 (1919).

102. *Ewing v. United States*, 135 F.2d 633, 635-36 (D.C. Cir. 1943), cert. denied, 318 U.S. 776, 63 S.Ct. 829 (1943). The prosecutrix is not an accomplice. *Trimble v. Territory*, 8 Ariz. 273, 71 Pac. 932 (1903); *Reeves v. Territory*, 2 Okla. Crim. 351, 101 Pac. 1039, 1042 (1909), citing 7 WIGMORE, EVIDENCE §§ 2060, 2061. See 30 N.Y.U.L. REV. 994, 997 (1955); 30 MICH. L. REV. 1291 (1932). For the English law see *Glanville Williams, Corroboration—Sexual Cases*, 1962 CRIM. L. REV. (Eng.) 662.

103. *Kidwell v. United States*, 38 App. D.C. 566, 573 (D.C. Cir. 1912). See 3 VILL. L. REV. 220, 221 (1958). Compare *Yeager v. United States*, 16 App. D.C. 356, 360 (D.C. Cir. 1900).

104. *Colon-Rosich v. People of Puerto Rico*, 256 F.2d 393, 396 (1st Cir. 1958).

105. *Bray v. United States*, 39 App. D.C. 600, 605 (D.C. Cir. 1913). See Note, 30 N.Y.U.L. REV. 994, 999 (1955).

The victim of an abortion is not strictly an accomplice,¹⁰⁶ but is morally implicated and an instruction to consider this as to credibility may be given.¹⁰⁷

Curiously, in a case involving the taking of indecent liberties with a minor child aged five, the child being incompetent as a witness, testimony of the victim's mother as to the child's statement to her of what the defendant did was not sufficient to support the verdict.¹⁰⁸ But in a prosecution for homosexual assault upon a male child, the spontaneous statement of the minor is sufficient.¹⁰⁹

In a case arising in Alaska, it was held that an eleven-year-old girl was not an accomplice to the offense of unnatural carnal copulation by means of the mouth.¹¹⁰ However, where the other participant is a male, he is an accomplice.¹¹¹ It should be noted that no corroboration is needed as to sexual offenses where the crime is committed through force, threats, duress, fraud, or undue influence.

On a prosecution for inviting another for lewd and immoral purposes, Judge Prettyman stated that "the testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution."¹¹² Weight should also be given to the good character of the defendant. The trial judge should "require corroboration of the circumstances surrounding the parties at the time, such as presence at the alleged time and place and similar provable circumstances."¹¹³

An accomplice must be a participant in the crime. Hence, if his act is not criminal, he is not an accomplice. Illegal entry by an alien is not a crime by him; therefore, he is not an accomplice to the one who illegally brings him in.¹¹⁴ There is little danger of perjury here because such a witness does not testify on the basis of a hope or expectation of advantage as an accomplice might. A witness who, though urgently solicited to take part, declined to have something to do with the act, is not an accomplice.¹¹⁵ Witnesses serving a taxpayer as bookkeeper and cashier are not necessarily accomplices to tax evasion,¹¹⁶ nor are

106. *Thompson v. United States*, 30 App. D.C. 352 (D.C. Cir. 1908); *United States v. Holte*, 336 U.S. 140, 145, 35 S.Ct. 271, 272 (1915).

107. *Peckham v. United States*, 210 F.2d 693, 700 (D.C. Cir. 1953). See 7 WIGMORE, EVIDENCE § 2060, n.12 (3d ed. 1940); 12 Ann. Cas. 1009 (1909); Annot., 139 A.L.R. 993 (1942).

108. *Jones v. United States*, 231 F.2d 234, 245 (D.C. Cir. 1956).

109. *Konvalinka v. United States*, 162 A.2d 778 (D.C. Mun. App. 1960).

110. *Hutson v. United States*, 238 F.2d 167, 171 (9th Cir. 1956).

111. *Christy v. United States*, 261 F.2d 357, 359 (9th Cir. 1958).

112. *Kelly v. United States*, 194 F.2d 150, 154 (D.C. Cir. 1952).

113. *Id.* at 155.

114. *Emmanuel v. United States*, 24 F.2d 905, 906 (5th Cir. 1928); see also *Campbell v. United States*, 47 F.2d 70, 71 (5th Cir. 1931); *Singer v. United States*, 278 Fed. 415, 419 (3d Cir. 1922).

115. *Tomlinson v. United States*, 93 F.2d 652, 654 (D.C. Cir. 1937).

116. *United States v. Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949). Conviction was reversed.

porters and bellboys necessarily accomplices of a hotel proprietor charged with income tax evasion.¹¹⁷ Where a defendant is prosecuted for criminal contempt in collecting excessive rentals in violation of an injunction, her employee who collected the rentals is not necessarily an accomplice.¹¹⁸ Conviction of violating the Emergency Price Control Act could be based on the testimony of persons who purchased meat from the defendants at over-ceiling prices. In that case the court held that even if the purchasers were accomplices their evidence was sufficient.¹¹⁹ However, the trial judge had admonished the jury to subject their testimony to close scrutiny. A mere spectator at a murder does not become an accomplice by not disclosing the homicide until some time afterward.¹²⁰

One who, as a spy, obtains information of a crime is not necessarily open to impeachment thereby, but one who has worked for hire may be open to suspicion of bias or interest, and the instructions should point this out.¹²¹ In general a mere decoy is not an accomplice.¹²²

Where the only testimony given to connect the defendant with the unlawful sales of narcotics is that of a paid informer, who was a drug addict, it is reversible error to refuse the defendant's request for an instruction that an informer's testimony should be examined by the jury with greater scrutiny than the testimony of an ordinary witness.¹²³ And where the government was unable to produce the informer, the court may refuse an instruction concerning the effect of the testimony he might have given, had he been present.¹²⁴ In a prosecution for filing false non-Communist affidavits, it was held not reversible error to decline to warn the jury against acceptance of the testimony of informers.¹²⁵ Thus the defendant cannot complain when he does not ask for a specific instruction.¹²⁶ In 1960, the Second Circuit ruled in a drug prosecution case that refusal to give a cautionary instruction was reversible error where the Government's case depends almost entirely

117. *Risinger v. United States*, 236 F.2d 96, 99 (5th Cir. 1956).

118. *Rapp v. United States*, 146 F.2d 548, 550 (9th Cir. 1944).

119. *Stillman v. United States*, 177 F.2d 607, 616 (9th Cir. 1949).

120. *Bird v. United States*, 187 U.S. 118, 133, 23 S.Ct. 42, 48 (1902).

121. *Fisher v. United States*, 231 F.2d 99, 106 (9th Cir. 1956). The court cited 3 WIGMORE, EVIDENCE § 969 (3d ed. 1940).

122. *Lemke v. United States*, 211 F.2d 73, 76 (9th Cir. 1954), *cert. denied*, 347 U.S. 1013, 74 S.Ct. 866 (1954); *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933), *citing* WIGMORE, EVIDENCE § 2060 (3d ed. 1940); *Ritzman v. United States*, 3 F.2d 718, 720 (D.C. Cir. 1925); *Wilson v. United States*, 260 Fed. 840 (8th Cir. 1919); *Shepard v. United States*, 160 Fed. 584, 593 (8th Cir. 1908).

123. *Fletcher v. United States*, 158 F.2d 321 (D.C. Cir. 1946); *United States v. Masino*, 275 F.2d 129, 133 (2d Cir. 1960).

124. *Dear Check Quong v. United States*, 160 F.2d 251, 253 (D.C. Cir. 1947).

125. *Jencks v. United States*, 226 F.2d 540, 552 (5th Cir. 1955).

126. *Walker v. United States*, 285 F.2d 52, 61 (9th Cir. 1960); *Young v. United States*, 297 F.2d 593 (9th Cir. 1962).

upon the two Government witnesses.¹²⁷ One witness was an accomplice and one was a paid informer.

Interestingly enough, where the defendant requested an instruction in which certain witnesses were designated as accomplices, he could not object when the instruction given referred to them as accomplices even though whether or not they were was a jury issue.¹²⁸

It is a question for the jury as to whether the witness is in fact an accomplice.¹²⁹ Thus in a prosecution for smuggling marihuana into the United States, guilt was presumed from the possession of the marihuana, even though actual or physical possession was in the defendant's paramour, who testified as a Government witness. It was held that the failure of the trial judge to allow the jury to decide whether the paramour was telling the truth, whether the paramour or the defendant was guilty by possession of the marihuana, and to decide whether the paramour was an accomplice and then to weigh with caution the credibility of her testimony was plain error under Rule 52 (b) of the Federal Rules of Criminal Procedure requiring reversal.¹³⁰

It is the better practice for the court in instructing the jury not to classify witnesses as accomplices when they have pleaded not guilty and have not yet been tried.¹³¹

In England, the House of Lords has held that the following are accomplices: principals and accessories before or after the fact in felony cases; persons committing, procuring or aiding and abetting in misdemeanor cases; receivers of stolen goods in larceny trials of the thieves from whom they received the goods, and parties giving evidence of other offenses where evidence of other offenses is admissible against the defendant.¹³²

VI.

WHAT IS CORROBORATIVE EVIDENCE

In 1829, a district judge stated that "it is usual for the court to advise a jury not to regard the evidence of an accomplice unless he

127. *United States v. Masino*, 275 F.2d 129, 133 (2d Cir. 1960). See further as to testimony of informers and privilege Orfield, *Privileges in Federal Criminal Evidence*, 40 U. DET. L.J. 403, 419-23 (1963).

128. *Thompson v. United States*, 202 Fed. 401, 407 (9th Cir. 1913). See also *Lee v. United States*, 32 F.2d 424 (D.C. Cir. 1929).

129. *Holmgren v. United States*, 217 U.S. 509, 523, 30 S.Ct. 588, 591 (1910); *United States v. Balodimas*, 177 F.2d 485, 487 (7th Cir. 1949); *Egan v. United States*, 287 Fed. 958, 966 (D.C. Cir. 1923); *United States v. Neverson*, 12 D.C. (1 Mackey) 152, 156 (1880). This is also the English view. Williams, *Corroboration—Accomplices*, 1962 CRIM. L. REV. (Eng.) 588, 594.

130. *Phelps v. United States*, 252 F.2d 49, 52 (5th Cir. 1958).

131. *Henderson v. United States*, 202 F.2d 400, 406 (6th Cir. 1953).

132. *Davies v. D.P.P.* [1954] P. 378, 400 (C.A.).

is confirmed in some parts of his testimony by unimpeachable testimony."¹³³

Fourteen years later Circuit Justice McLean instructed a jury as follows: "But if an accomplice be corroborated in some material circumstances a jury will the more readily believe his other statements. The corroboration must be of some material part of his relation. That which goes to prove directly or indirectly the offense charged and not an immaterial fact."¹³⁴

The above views seem to be synthesized in the following charge:

[I]n regard to the manner and extent of corroboration required, learned judges are not perfectly agreed. Some have deemed it sufficient if the witness is confirmed in any material part of the case. Others have required confirmatory evidence that the prisoner actually participated in the offense. It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. I think that the true rule is that the corroborative evidence must relate to some portion of the evidence which is material to the issue.¹³⁵

A district judge stated in instructing the jury that

[I]t is a prudential rule that all witnesses who are confessed accomplices should be corroborated in some material part. It is not necessary to corroborate in every part of the act, in every part of that which goes to make up a crime in every detail, but if he is corroborated in some material fact that is sufficient; that goes to show by the light of other evidence the truth of the statement, and that is what the law means by saying he must be corroborated in every material part. It must in some particular, tend to show the guilt or innocence of the parties outside of his evidence. That corroboration may come from oral testimony or from documentary letters, from writing.¹³⁶

Another approach is demonstrated by a 1918 district court explanation that "Corroborating evidence is evidence which is independent of the evidence of an accomplice, and which, taken by itself, leads to the inference, not only that a crime has been committed, but that the person

133. *United States v. Kessler*, 26 Fed. Cas. 766, 769 (No. 15528) (C.C.D. Pa. 1829). See Note, 14 IOWA L. REV. 479 (1929); Note, 18 ORE. L. REV. 253 (1939). As to English law see Williams, *Corroboration—Accomplices*, 1962 CRIM. L. REV. (Eng.) 588, 591.

134. *United States v. Troax*, 28 Fed. Cas. 216, 217 (No. 16540) (C.C.D. Ohio 1843).

135. *United States v. Lancaster*, 44 Fed. 896, 922 (W.D. Ga. 1891). See Christy v. *United States*, 261 F.2d 357, 358-59 (9th Cir. 1958).

136. *United States v. Howell*, 56 Fed. 21, 39 (W.D. Mo. 1892). The judge was the famous Isaac C. Parker of the Western District of Arkansas, often referred to as the "hanging judge." See also *Keliher v. United States*, 193 Fed. 8, 15-16 (1st Cir. 1912); *United States v. Giuliani*, 147 Fed. 594, 598 (D. Del. 1906); *United States v. Ybanez*, 53 Fed. 536, 540 (C.C.W.D. Tex. 1892).

on trial was implicated in it; or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime."¹³⁷

According to one case there is considerable discretion as to what may come in as corroborating evidence. The court rejected as opposed to the greater weight of reason the following contention of the defendant: "They insist that all testimony should be excluded which merely shows or tends to show that the accomplice has told the truth about something which does not, of itself and apart from his story, prove or tend to prove that defendant had any part in the crime."¹³⁸

Most of the state corroboration statutes require that the corroborating evidence implicate the defendant as to his identity or as to his participation in the offense rather than merely support the accomplice's general story.¹³⁹ On the other hand, Dean Wigmore maintains that whatever verifies part of his story would restore confidence as to all of it.¹⁴⁰

The testimony of another accomplice is not sufficient corroboration.¹⁴¹ A confession of a coconspirator, inadmissible against the defendant, may not be admitted to corroborate an accomplice.¹⁴² The testimony of the wife of an accomplice may sometimes be sufficient corroboration. The wife, not being an accomplice herself, may prove any independent fact not sworn to by her husband, and not forming any part of his acts.¹⁴³ The court left open whether or not she could confirm the statements of her husband. There has been considerable doubt as to whether or not the wife of a codefendant could testify for the Government against a codefendant, at least at a joint trial.¹⁴⁴ Even if competency be assumed, it may be that she has a privilege not to testify.¹⁴⁵

137. *United States v. Murphy*, 253 Fed. 404, 406 (N.D.N.Y. 1918).

138. *Hoback v. United States*, 296 Fed. 5, 8 (4th Cir. 1924), *cert. denied*, 265 U.S. 594, 44 S.Ct. 638 (1924). See 7 WIGMORE, EVIDENCE § 2059 (3d ed. 1940).

139. 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940); Note, 9 U.C.L.A.L. REV. 190, 191, 196 (1962).

140. 7 WIGMORE, EVIDENCE § 2059 (3d ed. 1940).

141. *United States v. Hinz*, 35 Fed. 272, 281 (C.C.N.D. Cal. 1888); *Arnold v. United States*, 94 F.2d 499, 506 (10th Cir. 1938). See criticism of this rule by Williams, *Corroboration—Accomplices*, 1962 CRIM. L. REV. (Eng.) 588, 592-93. But England, too, follows the rule. KENNY, *OUTLINES OF CRIMINAL LAW* 485 (17th ed. Turner 1958).

142. *Fitter v. United States*, 258 Fed. 567, 582 (2d Cir. 1919). See criticism 7 WIGMORE, EVIDENCE § 2059, n.2 (3d ed. 1940).

143. *United States v. Horn*, 26 Fed. Cas. 373 (No. 15389) (C.C.S.D.N.Y. 1862). In England it is doubtful how far an accomplice may be corroborated by his wife. KENNY, *OUTLINES OF CRIMINAL LAW* 485 n.8 (17th ed. Turner 1958).

144. Orfield, *Competency of Witnesses in Federal Criminal Cases*, 46 MARQ. L. REV. 324, 343-44 (1963). In England a witness whose husband X has been jointly indicted with Y is not an accomplice of Y for purposes of corroboration. KENNY, *OUTLINES OF CRIMINAL LAW* 485 n.8 (17th ed. Turner 1958).

145. Orfield, *The Husband-Wife Privileges in Federal Criminal Procedure*, 24 OHIO ST. L.J. 144, 155-56 (1963). But the privilege can be waived. *Id.* at 162.

Testimony of Government agents as to the defendant's admissions is sufficient corroboration of an accomplice who testifies to the concealment of heroin.¹⁴⁶ But in a later case concerned with housebreaking and larceny there was a reversal because the facts did not show admissions or confessions by the defendants.¹⁴⁷ But note that the testimony of the defendant who takes the stand, when equivocal and contradictory, may in effect be corroborative.¹⁴⁸

The Sixth Circuit has broadly stated through Judge Florence E. Allen: "Circumstantial evidence may be sufficient corroboration of the testimony of an accomplice. A declaration of a codefendant, if admissible, may corroborate the testimony of his accomplice. Admissions which tend to connect the accused with the crime may constitute corroboration."¹⁴⁹

The evidence of an accomplice cannot be corroborated by his statements at another time unless the said statement has been impeached.¹⁵⁰

The Supreme Court spoke on this issue in a case coming up from the Philippine Islands, where they held that the testimony of an accomplice in a murder case is not to be summarily discarded because of his base character, or his oscillating retraction and reiteration of the charge, but is "to be judged of by confirming or opposing circumstances as well as by his character and the influences that may invest him."¹⁵¹

A defendant is not entitled to an instruction that the jury would be justified in convicting only if the testimony of the accomplice convinced them beyond reasonable doubt, as this makes guilt or innocence depend solely on the credence given such testimony regardless of corroboration or any other consideration.¹⁵²

As one court has summarized the area:

To determine the truth or falsity of the testimony of an accomplice it should be weighed by the same rule as the testimony of other witnesses is weighed, that is, by considering the accomplice's connection with the crime and the defendant, his interest in the case, his appearance on the stand, the reasonableness of his testimony, and its consistency with other facts proved in the case.¹⁵³

146. *United States v. Mule*, 45 F.2d 132, 133 (2d Cir. 1930).

147. *Surratt v. United States*, 269 F.2d 240 (D.C. Cir. 1959).

148. *McClanahan v. United States*, 230 F.2d 919, 922 (5th Cir. 1956).

149. *Stanley v. United States*, 245 F.2d 427, 433 (6th Cir. 1957).

150. *United States v. Wilson*, 28 Fed. Cas. 699, 705 (No. 16730) (C.C.E.D. Pa. 1830). See 4 WIGMORE, *EVIDENCE* § 1128 (3d ed. 1940); Annot., 140 A.L.R. 21, 168-74 (1942); Orfield, *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 KAN. L. REV. 447, 477-80 (1963).

151. *Valdez v. United States*, 244 U.S. 432, 441, 37 S.Ct. 725, 727 (1917). Two justices dissented.

152. *Kearns v. United States*, 27 F.2d 854, 856 (9th Cir. 1928).

153. *Stanley v. United States*, 245 F.2d 427, 432 (6th Cir. 1957). See also *United States v. Kessler*, 26 Fed. Cas. 766, 769 (No. 15528) (C.C.D. Pa. 1829).

VII.

POLICY OF THE RULE

Statutes of different areas and territories of the United States have called for corroboration. Laws of the Canal Zone so provide, and corroboration is not sufficient which merely shows commission of the offense charged.¹⁵⁴ There are similar laws for the Territories of Alaska,¹⁵⁵ Puerto Rico,¹⁵⁶ and for the Virgin Islands.¹⁵⁷

As of 1954, twenty-one states required corroboration of an accomplice's testimony.¹⁵⁸ In most of these states it is reversible error not to charge the jury to acquit unless the testimony of the accomplice is corroborated.¹⁵⁹

In England an accomplice to the offense to which the indictment relates is and always has been a competent witness. A conviction based on his uncorroborated evidence is valid.¹⁶⁰ The trial judge may instruct the jury that they are entitled, if they choose, to act on such evidence. But the practice of cautioning the jury against convicting on such evidence has existed for a century and a half. In 1954, the House of Lords held that there is a duty to caution, that this practice has become a rule of law, and that where the judge fails to caution, the conviction will be quashed, even if in fact there is ample corroboration, unless the appellate court can apply the proviso to Section 4 (1) of the Criminal Appeal Act of 1907.¹⁶¹

There can be little doubt that testimony by an accomplice may be more damaging and less reliable than that of a disinterested witness.¹⁶² There is greater likelihood of perjury because the accomplice, an admittedly guilty person, may seek to diminish the severity of his own punishment or may even try to gain revenge.¹⁶³

154. *Barnett v. Government of Canal Zone*, 25 F.2d 459 (5th Cir. 1928).

155. *Ing v. United States*, 278 F.2d 362, 366 (9th Cir. 1960). *ALASKA COMP. LAWS ANN.* §§ 58-5-1, 66-13-59 (1949). See *Stephenson v. United States*, 211 F.2d 702, 705 (9th Cir. 1954).

156. See 7 WIGMORE, EVIDENCE § 2056 n.10 (3d ed. 1940).

157. *Ibid.*

158. Note 54, COLUM. L. REV. 219, 233-34 (1954). See also 7 WIGMORE, EVIDENCE § 2056, n.10 (3d ed. 1940); 6 CATHOLIC U.L. REV. 165 (1957).

159. Note, 54 COLUM. L. REV. 219, 236 (1954).

160. KENNY, OUTLINES OF CRIMINAL LAW 483-84 (17th ed. Turner 1958); SHAW, EVIDENCE IN CRIMINAL CASES 227-32 (3d ed. Lee 1947); WILLIAMS, THE PROOF OF GUILT 107-26 (1955).

161. *Davies v. D.P.P.* [1954] A.C. 378, 399 (C.A.). Note, 1954 CAMBRIDGE L.J. 169; 70 L.Q. REV. 301 (1954); 17 MODERN L. REV. 370, 373. See WILLIAMS, THE PROOF OF GUILT 112-17 (1955).

162. Note, 54 COLUM. L. REV. 219, 234 (1954).

163. *Emmanuel v. United States*, 24 F.2d 905, 906 (5th Cir. 1928); *Freed v. United States*, 266 Fed. 1012, 1014 (D.C. Cir. 1920); *United States v. Troax*, 28 Fed. Cas. 216, 217 (No. 16540) (C.C.D. Ohio 1843). See WILLIAMS, THE PROOF OF GUILT 107, 112 (1955); Note, 9 U.C.L.A.L. REV. 190, 192 (1962); Note, 30 MICH. L. REV. 1291, 1298 (1932).

Some protection may be given to the defendant against accomplice testimony when he, the defendant, is allowed to ask the witness if he expects to gain some advantage because of his testimony.¹⁶⁴ But there is some authority forbidding such questioning.¹⁶⁵ Additional protection is given by the long established federal rule that a federal judge may comment on the facts.¹⁶⁶ While this protection has disappeared in most of the states, it has always been the federal rule.¹⁶⁷

The fact that the evidence of one witness is not enough as to treason and perjury does not necessarily argue for a similar rule as to accomplices. As Judge Yankwich has pointed out: "In the case of treason the provision is embedded in the Constitution. In the case of perjury the rule is 'deeply rooted in past centuries.'"¹⁶⁸

It has been concluded that a rule requiring corroboration may not be desirable for several reasons.¹⁶⁹ The state court rule has been whittled down by calling the crime committed an "infraction" rather than an "offense." Cases have held that there is no reversible error if the defendant failed to request the correct charge. At least one state has expressly eliminated the requirement as to certain offenses.¹⁷⁰ In 1939, a New York Law Revision Commission suggested a repeal of the New York statute on the grounds that it is a refuge of organized crime and protects the principals in racketeering cases. Finally the statutory rule is too rigid, as it arbitrarily determines in advance of testimony, and without considering demeanor, that an accomplice is not credible.¹⁷¹ It has been pointed out that "the extreme suspicion of accomplice evi-

164. *United States v. Hogan*, 232 F.2d 905 (3d Cir. 1956); *United States v. Migliorino*, 238 F.2d 7, 10-11 (3d Cir. 1956); *King v. United States*, 112 Fed. 988 (5th Cir. 1902).

165. *Harrod v. United States*, 29 F.2d 454 (D.C. Cir. 1928), criticized 14 *Iowa L. Rev.* 497 (1929).

166. In several states corroboration statutes were enacted primarily because of the fact that the trial judge may not comment on the evidence. 7 *WIGMORE, EVIDENCE* § 2056 (3d ed. 1940); 7 *CALIF. L. REV.* 272, 273 (1919); Note, 34 *HARV. L. REV.* 667, 669 (1921); Note, 30 *MICH. L. REV.* 1291, 1302 (1932); Note, 9 *U.C.L.A.L. REV.* 190, 193 n.19 (1962).

167. The federal trial judge "may assist the jury by pointing out to them what evidence before them is pertinent as to each particular issue upon which they are to pass and what is not." *Hoback v. United States*, 296 Fed. 5, 9 (4th Cir. 1924), *cert. denied*, 265 U.S. 594, 44 S.Ct. 638 (1924).

168. *Audett v. United States*, 265 F.2d 837, 848 (9th Cir. 1959).

169. Note, 54 *COLUM. L. REV.* 219, 236-37 (1954).

170. Furthermore, narrow definitions of who are accomplices may be adopted. See, for example, as to the California definition 2 *U.C.L.A.L. REV.* 571 (1955); 9 *U.C.L.A.L. REV.* 190, 193-96 (1962). See also 25 *VA. L. REV.* 203, 204, 210 (1938).

171. See Note, 24 *BROOKLYN L. REV.* 324, 341 (1958); Note, 22 *ST. JOHN'S L. REV.* 267, 269 (1948); 7 *WIGMORE, EVIDENCE* § 2056 (3d ed. 1940); *Audett v. United States*, 265 F.2d 837, 847 (9th Cir. 1959), citing 7 *WIGMORE, EVIDENCE* § 2057 (3d ed. 1940); 17 *ORE. L. REV.* 118, 125 (1938); Williams, *Corroboration—Accomplices*, 1962 *CRIM. L. REV. (Eng.)* 588, 595.

dence does not appear to be shared by Continental judges.”¹⁷² The modern trend is to admit all relevant evidence.¹⁷³

Certainly one situation in which no warning to the jury should be given is where the defendant does not take the stand. The English rule requiring a warning even in such a situation has been called “unnecessarily tender to the accused.”¹⁷⁴ It is because defendants have been unwilling to take the stand that there has been special need for accomplice testimony.¹⁷⁵ Of course if the defendant takes the stand, it may turn out that his testimony is so equivocal and so contradictory as to support the testimony of the accomplice.¹⁷⁶

Possibly one method to prevent improper convictions based on accomplice testimony is to empower the appellate courts to review the facts.¹⁷⁷ On the other hand, it is arguable that such power would place too great a burden on those courts.¹⁷⁸

172. Williams, *Corroboration—Accomplices*, 1962 CRIM. L. REV. (Eng.) 588, 589.

173. Note, 6 CATHOLIC U.L. REV. 165, 167 (1957). See *United States v. Apuzzo*, 245 F.2d 416, 420 (2d Cir. 1957).

174. WILLIAMS, *THE PROOF OF GUILT* 116-17 (1955); Williams, *Corroboration—Accomplices*, 1962 CRIM. L. REV. (Eng.) 588, 592.

175. Note, 35 CORNELL L.Q. 663, 672 (1950).

176. *McClanahan v. United States*, 230 F.2d 919, 922 (5th Cir. 1956).

177. MCCORMICK, *EVIDENCE* 230 n.5 (1954).

178. See MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 491 (4th ed. 1957).